No. 87-1589 and 87-1888

In the Supreme Court of the United States

OCTOBER TERM, 1988

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

PITTSBURGH AND LAKE ERIE RAILROAD COMPANY,
PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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QUESTION PRESENTED

Whether the majority of the court below was correct in concluding that it was compelled to hold that the Interstate Commerce Act (ICA) does not supersede the Railway Labor Act (RLA) and the Norris LaGuardia Act (NLGA) when necessary to permit consummation of a Commission authorized transaction, which followed a judicially approved process in which rail labor participated, notwithstanding the court's acknowledgement that the effect of its holding is the frustration of a Congressionally designed program to promote continued rail service.

PARTIES TO THE PROCEEDINGS

The petitioner in Nos. 87-1589 and 87-1888 is the Pittsburgh & Lake Erie Railroad Company. The respondent in 87-1589 is the Railway Labor Executives' Association. The respondents in 87-1888 are the Railway Labor Executives' Association and the Interstate Commerce Commission.

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OPINIONS BELOW

The opinions of the court of appeals are reported at 831 F.2d 1231 (Pet. App. (No. 87-1589) 1a-13a)[1] and at 845 F.2d 430 (Pet. App. (No. 87-1888) 1a-70a). The opinions of the Interstate Commerce Commission (Pet. App. (No. 87-1888) 96a-104a, 105a-108a) are unreported.

[1] "Pet. App." refers to the appendices to the petitions for writs of certiorari in Nos. 87-1589 and 87-1888.

JURSIDICTION

The judgments of the court of appeals (Pet. App. (No. 87-1589)1a) and (Pet. App. (No. 87-1888)1a) were entered on October 26, 1987, and April 8, 1988. The petitions for writs of certiorari were filed on March 24, 1988 and May 17, 1988 and granted on November 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. 10505, 10901 and the Railway Labor Act, 45 U.S.C. 156, are set out Pet. App. (No. 87-1888) 86a-91a. Pertinent provisions of the Norris-LaGuardia Act, 29 U.S.C. 104 are set out at Pet. App. (No. 87-1589) C1-C2.

STATEMENT

The Interstate Commerce Commission (Commission) has plenary authority to examine, condition, and approve proposed rail carrier sales, abandonments and consolidations. Under Section 10901 of the Interstate Commerce Act (ICA), 49 U.S.C. 10901, a non-carrier can acquire and operate a railroad line "onlv if the Commission finds that the public convenience and necessity require or permit" that it be done.

Under Section 10505 of the ICA, the Commission has the power to exempt rail transportation from the requirements of the Act. In fact, the Commission "shall exempt" rail transportation "when the Commission finds that the application of a provision of this subtitle. . . "is not necessary to carry out the transportation policy of Section 10101a." 49 U.S.C. 10505(a)(1). Among other things, however, the exemption "does not relieve a carrier of its

obligation to protect the interests of employees" insofar as such protection is afforded by the ICC under 10901 or other provisions of the ICA. 49 U.S.C. 10505(g)(2). The Commission retains its authority over the exempt transaction and may revoke the exemption to the extent the Commission finds necessary to carry out the transportation policy embodied in the ICA. 49 U.S.C. 10505(d).

REGULATORY FRAMEWORK

In the years just after the partial deregulation of the railroad industry occasioned by the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1941-45, numerous new short lines and regional rail lines were created, pursuant to 49 U.S.C. 10901, through the sale of marginally profitable and unprofitable rail lines to new entities eager to provide rail service. In considering and approving these sales, the Commission became convinced that the expense imposed on such sales by the imposition of labor protective conditions was hampering the development of short line railroads and, indeed, was forcing the selling carriers to abandon these marginal lines pursuant to 49 U.S.C. 10903 of the ICA.

In order to foster the development of short line railroads to preserve rail facilities, service and employment that would otherwise be lost through abandonments, the Commission began withholding labor protections in individual sales.[2] After considering over five years many

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[2] The imposition of labor protections in short line sales to new entrants is within the Commission's discretion. The Commission's theory on withholding protection was grounded on the premises that preservation of continued rail service through line sales to new entrants (1) is beneficial to shippers and the communities served, (2) offers the best opportunity for rail labor's employment, and (3) this process is preferable to the process of abandonment and sale of the marginal line under 49 U.S.C. 10903 and 10905. See, *Knox and Kane Railroad*

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such applications, the Commission determined that formation of new rail carriers should be encouraged. In order to aid rail formations, the Commission promulgated the procedures in Ex Parte No. 392 (Sub-No.1), *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901,* 1 I.C.C. 2d 810 (1985) aff'd sub nom. *Illinois Commerce Commission* v. *ICC*, 817 F.2d 145 (D.C. Cir. 1987) (mem.) ("Ex Parte 392"). In *Ex Parte 392* the Commission exempted rail line sales to new carriers from full compliance with Commission procedures while retaining authority, under its revocation power, to review the transaction and correct any problem arising out of the transaction.

Ex Parte 392 establishes a scheme by which an entity or a carrier can apply for an exemption which will be granted seven days after filing, unless the Commission notifies the parties to the contrary. See 49 C.F.R. 1150.[3] Any opposition to the exemption could be lodged via a petition to revoke the exemption filed with the Commission at any time. Commission consideration of the petition to revoke could result in partial revocation of the exemption, imposition of labor protective conditions or cancellation of the transaction through the termination of the entire ex-

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Co.-Gettysburg Railroad-Petition for Exemption, 366 I.C.C. 439 (1982).

A history of the development of line sales to new carriers, its causes and consequences, and the Commission's view of its authority to preempt other statutes may be found in the Commission decision, Finance Docket No. 31205, *FRVR Corporation-Exemption Acquisition and Operation-Certain Lines of C&NW Transportation Company-Petition for Clarification* (January 29, 1988); *petition for review denied, sub. nom. RLEA v. ICC,* 861 F.2d 1082 (8th Cir. 1988); petition for rehearing pending. (Pet. App. 109a-129a).

[3] On February 29, 1988, the Commission modified the Ex Parte 392 procedures to extend the notice period and delay the effective date of the exemptions involving line sale transactions that result in the creation of larger railroads. 53 Fed. Reg. 5,081.

emption. The Commission's order disposing of the petition is reviewable in the courts of appeals. 28 U.S.C. 2342.

Ex Parte 392 was formulated with the participation of RLEA and in the face of an RLEA demand that the Commission impose labor protections on all 10901 sale transactions. 1 I.C.C. 2d at 813-815. The Commission rejected this demand in favor of the imposition of labor protections in individual transactions upon a showing of exceptional circumstances justifying such imposition. 1 I.C.C. 2d at 815. Thereafter RLEA sought review of *Ex Parte 392* in the court of appeals. This petition was denied. See *Illinois Commerce Commission v. ICC,* 817 F.2d 145 (D.C. Cir. 1987) (*mem.*).

The Present Dispute

This case arose when the Pittsburgh & Lake Erie Railroad Company ("P&LE"), a railroad with 182 miles of track, decided to sell its entire railroad business. (Pet. App. (No. 87-1888)9a). After years of heavy financial losses, P&LE reached agreement with P&LE Railco, Inc. ("Railco") for the latter to buy and operate the line, albeit with a reduced number of employees. On September 19, 1987, Railco filed a Notice of Exemption with the Commission pursuant to *Ex Parte 392.* (Pet. App. (No. 87-1888)96a). RLEA requested the Commission to reject the notice and a related filing by Railco's parent, Chicago West Pullman Transportation Company ("CWPT"). (Pet. App. (No. 87-1888)98a). RLEA also filed with the Commission a "Complaint for Cease and Desist Orders and Other Relief." (*Id.*). In sum, these filings were aimed at obtaining a determination that the Commission could only approve the sale under 49 U.S.C. 11343 which requires the imposition of labor protections on all parties to the transaction. (Pet. App.(No. 87-1888)98a).

The Commission refused to stay or reject the exemption notices which became effective September 26, 1987. In its

order served September 29, 1987 in Finance Docket Nos. 31121, 31122 and 31126, *P&LE Railco, Inc.—Exemption Acquisition and Operation—Lines of the Pittsburgh and Lake Erie R. Co. and The Youngstown and Southern Ry Co.* (Pet. App. (No. 87-1888) 96a-104a), the Commission found that RLEA was not likely to succeed on the merits and had failed to show it would suffer irreparable harm in the absence of a stay. Moreover, the Commission found that any stay would harm the operations of P&LE, given the carrier's precarious financial position and the uncertainty surrounding the carrier's labor situation. *Id.*[4] RLEA then asked the Commission to reconsider and stay consummation of the sale. (Pet.App. (No. 87-1888) 105a-107a). RLEA did not, and has not, asked the Commission to impose labor protective conditions on the sale. The Commission denied the petition for reconsideration but required P&LE to retain its corporate existence until after the Commission completed review of any petition to revoke the exemption filed within 30 days of its decision. (Pet. App. (No. 87-1888) 101a).

Thereafter RLEA filed a petition to revoke the exemption granted by the Commission. (Pet. App. (No. 87-1888)106a). In this document RLEA argued that P&LE was insolvent and that, as an alternative to the sale to Railco, the Commission should require the purchase of P&LE's assets by its employees. The petition to revoke is pending before the Commission.[5]

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[4] On September 15, 1987 P&LE was struck by its unions.

[5] On November 3, 1988 RLEA filed with the Commission a petition styled as: Motion for Dismissal of Petitions upon Suggestion of Mootness. There RLEA contends that the sales agreement between P&LE and CWPT has no further force or effect. In RLEA's view the petitions to revoke the exemption are moot as the sale will not take place. RLEA also claims that the Commission should vacate the ex-

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RLEA also filed with the district court below (United States District Court for the Western District of Pennsylvania) a complaint requesting an injunction against the sale until P&LE exhausted the procedures of the Railway Labor Act (RLA), relating to collective bargaining over the carrier's decision to sell and the effects of the sale on the employees. P&LE defended on the ground that the sale is within the exclusive and plenary jurisdiction of the ICA and that ICC authorization of the transaction rendered resort to RLA procedures unnecessary. On October 8, 1987, the district court enjoined the strike that had crippled P&LE since early September. The court held that the strike was intended to negate the Commission's determination that employee protections should not be required in 10901 transactions; that the ICA relieved P&LE of any duty to bargain under the RLA; and that Section 4 of the NLGA must be accommodated to the purposes of the ICA and to the jurisdiction of the Commission to determine what employee protections should be required in 10901 transactions. (Pet. App. (No. 87-1888)14a).

On October 26, 1987, after an expedited briefing schedule and hearing, in which the Commission was granted leave by the court to participate as an *amicus*, a Third Circuit panel summarily reversed the District court on the issue of whether the court below had jurisdiction to enter an injunction against the strike. In the Third Circuit's view the ICA is not a labor statute and thus not a statute "to which the Norris-LaGuardia Act must be accommodated." 831 F.2d at 1240. The court, in a decision now popularly referred to as "*P&LE I*", remanded the case to the District Court. (Pet. App. (No. 87-1589)98a). The Petition for Writ of Certiorari in No. 87-1589 followed.

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emptions obtained by Railco pursuant to the "Munsingwear Doctrine," *United States v. Munsingwear Inc.*, 340 U.S. 34, 39 (1950). This motion is pending before the Commission. Respondent believes this matter is not moot for reasons set forth in our reply memorandum in No. 88-217 and the Solicitor General's *amicus* memorandum in these proceedings.

On remand the district court rejected the arguments that the ICA granted exclusive jurisdiction over rail carrier transactions authorized by the Commission and that the Commission's exclusive jurisdiction superceded the carrier's duty under the RLA to bargain over the sale and the effects of the sale. The court enjoined the sale until the carrier exhausted the bargaining procedures of the RLA to change existing collective bargaining agreements or the purchaser agreed to adopt them. (Pet. App. (No. 87-1888) 71a-85a).

P&LE, joined by the Commission as Intervenor, appealed this judgment to the Third Circuit. On April 8, 1988, that court rendered the decision popularly known as "*P&LE II*", 845 F.2d 420. A divided court of appeals felt "constrained" to hold the RLA dispute resolution procedures applicable to the sale of P&LE (Pet. App. (No. 87-1888) 5a and 57a) even though the result would frustrate the mandate of the ICA. *Id.* 6a. In reaching this conclusion the panel majority acknowledged that imposing the RLA requirements in this situation "may ultimately have the perverse effect of destroying the only chance P&LE has for survival . . ." (Pet. App. 57a)[6] and of frustrating a congressional program designed to promote continued rail service (Pet. App. 33a-35a).

The court first considered the issue of the character of the dispute between the parties. The panel found the dispute to be a major dispute under the RLA. The sale of the rail line accompanied by a "substantial reduction" of jobs entails, in the court's view, a "change in agreements affecting rates of pay, rules or working conditions" (Pet. App. 16a-18a) and signals, therefore, a major dispute that

[6] Since the granting of the status quo injunction in this case the number of entrants seeking exemption under the Ex Parte 392 procedures has decreased by approximately 50%. The mileage sought to be transferred has decreased by 85%. The mileage sought to be abandoned by rail carriers has increased for the first time since 1982. See footnote 11, *infra*.

normally triggers the RLA's status quo provisions unless "overridden by the ICA."

The panel majority construed its duty to "read the two statutes in harmony . . . for it is clear that repeals by implication are heavily disfavored" (citation omitted) (Pet. App.[1]44a-45a). With that in mind the majority shouldered aside the ICA in favor of the RLA. (Pet. App. 45a).

The majority rejected all the arguments advanced in favor of the ICA's supersession of the RLA. First, the majority found no explicit authority in the ICA to support its supersession of the RLA. (Pet. App. 37a). Second, it held that the relief sought by RLEA was not a collateral attack on the *Ex Parte 392* decision. It grounded this conclusion on its reading of the Commission's order granting the exemption as being "permissive" and not "mandatory" (Pet. App. 37a), on the conclusion that the district court's order did not impose any protection for labor but only required bargaining, and, finally, on its view that the district court's order did not block the sale but only delayed it and does not grant rail labor a veto over the sale. (Pet. App. 43a)

The majority advanced three reasons in support of its holding against ICA supersession of the RLA in rail transactions authorized by the Commission. First, it found "significant" the fact that, while the Commission unquestionably has the role of overseer of rail transportation, Congress did not amend the RLA's bargaining process to specifically declare that the RLA had no role in 10901 sales. (Pet. App. 33a). Second, the majority found it "unlikely" that Congress intended that rail labor look only to the Commission as its sole source of protection because the "interests of labor are . . . only a relatively small concern of the ICC", leaving the RLA intact as the mechanism for labor to assert its own interests. (Pet. App. 48a)[6]

[6] In support of this conclusion the Third Circuit listed fifteen policies the Commission is required to take into account in any rail

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Third, the majority opined that supersession of the RLA by the ICA may not be necessary. In their view, the provisions of the ICA that would relieve the carrier of its obligation under the RLA (Pet. App. 56a) did not present an "irreconcilable conflict" with the RLA (Pet. App. 56a). In summation, while conceding that the "trend in the case law has been to diminish the delaying effect of the RLA in cases where the Commission has approved the expeditious consummation of a transaction" (Pet. App. 53a), the majority held itself powerless in the face of the RLA and "constrained" to enjoin the sale until the RLA procedures had been complied with by the carrier, (Pet. App. 61a).

Judge Hutchinson dissented (Pet. App. 61a-69a) on the ground that the majority's result contravened the Staggers Act. In his view the ICA and the RLA are "inherently contradictory" and Congress intended the ICA to prevail. (Pet. App. 61a). The dissent noted that the Commission is required to balance the needs of all interests in the rail industry in order to maintain the national rail system, and that the status quo requirement of the RLA "contradicts the ICC's approval of the sale of P&LE . . . and makes that approval obsolete". (Pet. App. 62a). Further, in Judge Hutchinson's view, when Congress, in enacting the Staggers Act, *supra*, and the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 128 ("4R" Act), left the Commission's labor policies "largely untouched", even in the face of rail labor's strong efforts to change these policies, it signified Congress's agreement with Commission actions in not providing mandatory labor protections and with the Commission's role

transaction. *See,* 49 USC 10101a. It found that only one policy "directs the attention of the ICC to the interests of labor" (Pet App. 47a). Unmentioned in the *P&LE II* decision is the extensive history of ICC jurisdiction over rail labor protection issues. (*See,* Argument, Section D, infra, pgs. 29-35).

as the sole provider of labor protections in rail transactions committed to the Commission's approval process. (Pet. App. 64a, *citing* H.R. Conf. Rep. No. 1012, 99th Cong., 2d Sess. 250, reprinted in 1986 U.S. Code Cong. and Admin. News 3868, 3895; Railroad Transportation Policy Act of 1979; Hearing Before the Committee on Commerce, Science, and Transportation on S. 1946, 96th Cong., 1st Sess. 536, 539 (1979) and *RLEA v. ICC,* 784 F.2d 959, 965 (9th Cir. 1986) (discussing Congress's failure to amend ICA)).

Judge Hutchinson opined that RLEA's suit is a collateral attack on *Ex Parte 392* because the practical effect of this suit contradicts or countermands a Commission order. (Pet. App. 67a, *citing, UTU v. Norfolk and Western Ry. Co.* 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied* 107 S.Ct. 927 (1987); *B.F. Goodrich Co. v. Northwest Industries, Inc.*, 424 F.2d 1349, 1352-54 (3rd Cir.), *cert. denied,* 400 U.S. 822 (1970)). Finally, the dissent chides the majority for allowing RLEA's "artful wording" of its pleading to circumvent the avenue Congress has prescribed to appeal Commission denials of labor protection. (Pet. App. 67a, *citing, RLEA v. United States,* 811 F.2d 1327 (9th Cir. 1987)). P&LE filed a petition for a writ of certiorari to review this decision.

SUMMARY OF ARGUMENT

A. The Commission believes its right to present its position to this Court on these issues of paramount importance to Commission administration of the line sales program and the Commission's function as overseer of the rail national transportation system is undeniable. This Court's recent decision in *United States* v. *Providence Journal Co.*, 56 U.S.L.W. 4366, 4370, n.9 (May 2, 1988), far from raising doubts about the Commission's right to litigate in-

dependently before this Court, expressly recognized that right. See, *Providence Journal, supra,* fn. 9. Such a right must of necessity extend to defense against collateral attacks upon Commission orders to prevent the Commission's authority from being eroded if not totally debased.

B. The Court below erred in concluding that it must deny effect to the ICA in order to avoid repeal by implication of the RLA. The lower court's approach to reconciliation of the two statutes directly conflicts with this Court's recent decision in *United States* v. *Fausto,* __ U.S. __, 108 S.Ct. 668, 676 (1988).

C. The Commission's jurisdiction to authorize rail transactions is exclusive and plenary. This Court has consistently in the past determined the authority of the Commission over the approval of line extensions, consolidations, abandonments and other dispositions of rail property affecting rail transportation to be total. *Transit Commission* v. *United States,* 289 U.S. 121 (1933); *Schwabacher* v. *United States,* 334 U.S. 182 (1948); *Chicago & North Western Transportation Co.* v. *Kalo Brick and Tile Co.,* 450 U.S. 311 (1981) ("*Kalo Brick*"); and *ICC* v. *Brotherhood of Locomotive Engineers,* __ U.S. __, 107 S.Ct. 2360 (Stevens opinion) (1987).

The Commission's jurisdiction of necessity extends to the agency's oversight of labor management relations in connection with transactions it has authorized to ensure that the public benefits associated with the Commission authorized transactions will not be frustrated. *United States* v. *Lowden,* 308 U.S. 225 (1939); *ICC* v. *Railway Labor Association,* 315 U.S. 373 (1942); and *ICC* v. *BLE, supra.*

The decisions of the Third Circuit conflict with decisions of this Court upholding the Commission's exclusive and plenary authority over consolidations, abandonments, sales, and other dispositions of rail assets in the

rail industry, and with the agency's statutory obligation and authority to resolve labor management disputes arising out of Commission authorization of these transactions. *Norfolk & Western Ry. Co.* v. *Nemitz,* 404 U.S. 37 (1971); *Missouri Pacific Railroad Company* v. *UTU,* 782 F.2d 107 (8th Cir. 1986), *cert. denied,* 107 S.Ct. 3209 (1987) ("*MOPAC*"); *Hayfield Northern R. Co.* v. *Chicago & North Western Transportation Company,* 467 U.S. 622 (1984); *Burlington Northern Railroad Company* v. *UTU,* 848 F.2d 856 (8th Cir. 1988), *cert. denied,* 57 U.S.L.W. 3376. (November 28, 1988) ("*BN*").

D. The entire rationale of the decisions of the majority of the panels below for withdrawing the ICA's preemptive effect over labor disputes arising out of Commission authorized transactions is grounded in the false notion that the ICA is not a labor statute.[8] On the contrary the ICA is a labor statute to which the RLA and NLGA must be accommodated.

The history of labor management relations in the rail industry is in large measure the history of the Commission. The Commission's power to impose labor protections where necessary to ensure labor peace has long been recognized by this Court. *Lowden, supra*; *ICC* v. *Railway Labor Association, supra.* Moreover, the past decades have seen Congress steadily expand the Commission's role in resolving labor disputes in the rail industry. See, Transportation Act of 1940, 54 Stat. 899; 4R Act, *supra*; Staggers Rail Act of 1980, *supra.* This extensive history refutes the notion that the ICA is not a labor statute. In fact, it is the only rail labor statute in Congress's contemplation for resolving labor disputes which arise out of

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[8] The *P&LE II* court's authority for this proposition rests almost exclusively in the Third Circuit's prior *P&LE I* decision. *See* Pet. App. 50a, citing *RLEA v. P&LE,* 831 F.2d at 1236.

Commission approved transactions and it has enjoyed that status for fifty years.

Finally, a comparison of the dispute resolution procedures in the ICA, particularly those within 49 U.S.C. 10901, and those in the RLA confirms the ICA's status.[9]

Thus, the history of the ICA, Congressional action in amending the ICA, the case law and logic confirm the status of the ICA as a labor statute.

E. As a labor statute, the processes for dispute resolution contained in the ICA and *Ex Parte No. 392 (Sub-No. 1)* are as worthy of protection from strikes that would undermine them as are the comparable provisions of the RLA. In the line of cases known as the "accommodation" cases, courts have had to adjust two labor statutes, such as the RLA and NLGA, to each other. In the leading cases in this area, this Court has allowed the federal courts to enjoin strikes to protect the jurisdiction of the agency charged with resolving the particular labor dispute. *Brotherhood of R.R. Trainmen* v. *Chicago River and Indiana R.R.*, 353 U.S. 30 (1957); *Boys Markets, Inc.* v. *Retail Clerk's Union*, 398 U.S. 235 (1970). In those cases, as in procedures developed under *Ex Parte 392*, the agencies' procedures were designed to channel the dispute into a peaceful resolution of the issue. In the *Ex Parte 392* procedures the Commission offers a comprehensive administrative scheme for the resolution of any dispute arising out of the rail transaction similar to and consistent with the administrative processes protected by the Court in

[9] It is this administrative scheme that the *P&LE I* panel claimed would relegate RLEA "to a small voice of protest" of the transaction. Pet. App. 51a, n.28. To the contrary, rail labor has fully participated in establishing *Ex Parte 392*, the granting of this exemption and may still request the Commission to impose labor protections. Moreover, the Commission's determination with respect to the grant or denial of labor protection is reviewable.

Boys' Market and *Chicago River*. Clearly, a union may be enjoined from striking so that the *Ex Parte 392* procedures may be completed.

F. Reconciling the two conflicting statutory regimes in the manner proposed by the majority of the panel below negates the Commission's authority to approve transactions in the public interest by giving rail labor a veto. Adopting the reconciliation proposed by the Commission, on the other hand, permits Commission authorized transactions found to be in the public interest, after balancing all competing interests, to be consummated subject, of course, to review by the courts of the balancing process. Clearly, the latter construction is preferable even if it were up to the courts to construe the statutes in the first instance, which we submit it is not in view of the reasonable construction of the Commission – the agency charged with administering the rail line sales program. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

ARGUMENT

A. THE INTERSTATE COMMERCE COMMISSION HAS THE INDEPENDENT LIGITATING AUTHORITY TO DEFEND ITS ORDERS BEFORE THIS COURT

The Solicitor General, by letter dated June 14, 1988, advised the Court that he had determined the Interstate Commerce Commission is not "properly a party respondent" and that he has not authorized the filing of a responsive brief in this case. Similarly, in an amicus memorandum addressed to the Commission's independent petition for writ of certiorari to the Third Circuit in *P&LE II* (No. 88-217), the Solicitor General urged the Court to dismiss the Commission's petition. His position is that Commission intervention in the proceeding below to defend

against collateral attack on the *Ex Parte 392* procedures and premature judicial intrusion upon a proceeding then pending before the agency was improper even though authorized by the court below. Although the Commission believes that the court's acceptance of the Commission's filings in support of granting the writs in these proceedings and denial, as opposed to dismissal, of the Commission's petition in No. 88-217 is dispositive of this issue, we briefly outline our position herein. For a more complete elaboration of that position, the Court is respectfully referred to the Commission's petition for writ of certiorari and reply to opposition in No. 88-217.

The Interstate Commerce Commission has the authority to independently litigate before this Court and in the lower courts in defense of its orders. The Commission's right to do so has been recognized since at least this Court's decision in *ICC* v. *Oregon-Washington Rail Co.*, 228 U.S. 14 (1933) and, rather than being called into question by the Court's recent decision in *Providence Journal, supra,* fn 9, is vindicated by that decision. This authority extends to the defense against collateral attacks on Commission orders of the character launched by RLEA in this case. *Venner* v. *Michigan Central Railroad Co.*, 271 U.S. 127 (1925). 28 U.S.C. 2323 grants the Commission the authority to appear on its own motion in any action involving the validity of a Commission order. See, H. Rep. No. 93-1569, 93d Cong., 1st Sess. 9 (1974).[10] The denial of Commission authority to appear in cases collaterally attacking ICC orders would lead almost inevitably to evasion of direct review by parties to Commission proceedings, prevent the Commission defense of its position

[10] See also, Hearing on S. 663, United States Senate Subcommittee on Improvements in Judicial Machinery, Committee on the Judiciary, 93d Cong., 1st Sess. (1973).

where executive branch policy is contrary to Commission policy, and deprive the Court of the views of a central party in such disputes. Such a result is unacceptable under *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624 (1935) and *Morrison* v. *Olson*, __ U.S. __, 108 S.Ct. 2397 (1988) and contrary to the Congressional will as expressed in the debate over changing the process for judicial review of Commission orders. H. Rep. No. 93-1569, *supra.*

B. THE COURT OF APPEALS MISTAKENLY CONDEMNS THE SUPERSESSION OF THE RLA BY THE ICA AS AN IMPLIED REPEAL OF THE RLA

The Third Circuit panel's majority considered its duty to be to read the ICA and RLA together in order to prevent what it called the "repeal by implication of the RLA" Pet. App. 6a, *citing Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981). The law is clear that the RLA has no role to play in ICC approved transactions (See Argument Section C, *infra*). Moreover, this Court has recently held the Third Circuit's formulation of the implied repeal of a statute to be in error. Thus, the court below misperceived its duty and engaged in the wrong analysis to reach its conclusion.

In *United States* v. *Fausto*, __ U.S. __, 108 S.Ct. 668, 676 (1988), the Court confirmed that what it confronts here, as there, is simply "a repeal by implication of a legal disposition implied by a statutory text" and not "a repeal by implication of an express statutory text." (*Id*). The Court found that the former task is frequently done "whenever, in fact, they (Congress) interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted." (*Id*). In such circumstances, what the Court faces is the "classic judicial task of reconciling many laws enacted over time, and getting them to

"make sense" in combination." (*Id.*). A task that "necessarily assumes that the implications of a statute may be altered by the implications of a later statute." (*Id.*). This reconciliation process was essentially followed in *Boys Market* v. *Clerks' Union, supra,* at 250-251 (1970), where the Court accommodated the NLGA to permit the effectuation of the arbitration procedures of the Labor Management Relations Act. (See, Argument, Section E, infra). In the instant case this Court is reviewing the RLA in light of the ICA and its statutory commands. The Commission submits that the implications of the RLA are changed when a Commission approved transaction is present and that this alteration is not an implied repeal of the RLA.

C. THE INTERSTATE COMMERCE COMMISSION'S APPROVAL OF A RAIL TRANSACTION UNDER SECTION 10901 OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. 10901, EXEMPTS THE PARTICIPANTS FROM PROVISIONS OF ANY STATUTE THAT ACTS AS AN OBSTACLE TO THE IMPLEMENTATION OF THE APPROVED TRANSACTION

The court of appeals erred in holding that the Commission's approval of a rail sales transaction under Section 10901 of the ICA is insufficient to exempt a participant from the requirements of other laws where those laws act as obstacles to the transaction. The ruling is inconsistent with the structure and purposes of the ICA's provisions, longstanding precedent and the Congressional determination to give the Commission the role of overseer of the nation's rail transportation system. It has seriously impeded the implementation of Commission approved transactions

designed to revitalize the nation's regional railroad system.[11]

When considering transactions for approval pursuant to the ICA the Commission's authority over rail transportation is total. The Commission has exclusive and plenary authority over the consolidation, transfer, abandonment and sale of rail lines. *Schwabacher* v. *United States,* 334 U.S. 182 (1948); *ICC* v. *Brotherhood of Locomotive Engineers, supra*; *Kalo Brick, supra.* This jurisdiction extends to the sale or transfer of rail lines and rail properties to non-carrier entities that seek to provide rail transportation. 49 U.S.C. 10501(d) and 10901.

This Court has previously had occasion to review and uphold the exclusive and plenary nature of the Commission's authority in abandonments, mergers, and consolidations of rail properties. The sole rail line transaction not explicitly ruled on by the Court is that relating to the sale of lines to non-carrier entities, the case now before the Court.

The Commission's authority has consistently been held by this Court to extend to all matters and disputes which

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[11] The *Ex Parte 392* procedures had been effective. Railroad formation had risen each year since 1982 and the miles of lines abandoned by carriers had fallen each year since that year. However, since the court of appeals decisions the number of entrants seeking exemptions under the *Ex Parte 392* procedures has decreased by approximately 50% from 1987 to 1988. Moreover, the number of miles sought to be abandoned increased for the first year since 1982 from 1,932 in FY 1987 to 2,996 in FY 1988. See, Finance Docket No. 31205, *FRVR Corporation—Exemption, Acquisition and Operation—Certain Lines of Chicago & North Western Transportation Co. Petition for Clarification,* Served January 29, 1988, *Petition for review denied sub nom., RLEA v. ICC,* 861 F.2d 1082 (8th Cir., 1988); petition for rehearing pending. See also, *Stopped in their Tracks,* Forbes Magazine, May 30, 1988, p. 11.

arise from the authorized transaction. Such a result is necessary because no activity by any party can be allowed to frustrate consummation of the transaction authorized by the Commission and the public interest in that transaction which the Commission's approval entails. *Nemitz* v. *Norfolk and Western,* 436 F.2d 841, 845 (6th Cir.) *aff'd, Norfolk & Western R. Co.* v. *Nemitz,* 404 U.S. 37 (1971); *Kalo Brick, supra,* at 320. A necessary component of this regulatory framework is that other laws on occasion have been deemed to be preempted or superseded to the extent that the operation of those other laws stand as obstacles to the consummation of a Commission authorized transaction. *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, 788 F.2d 724 (1st Cir.) *cert. denied,* 107 S.Ct. 111 (1986) ("*B&M*"). The courts have uniformly upheld the preemptive effect of the exercise of the Commission's authority without regard to which provision of the ICA the transaction is authorized under. *Brotherood of Locomotive Engineers* v. *C&NW*, 314 F.2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963) ("*C&NW*"). (The court held the Commission's preemptive authority was a necessary part of the Commission's power without which the ICA's power to authorize mergers would be "completely ineffective." *C&NW, supra,* at 430-431, *citing RLEA* v. *U.S.*, 339 U.S. 142 (1950) and *United States* v. *Lowden,* 308 U.S. 225 (1939)). The Eighth Circuit's decisions in *MOPAC, supra,* and *BN, supra,* are in accord. In *MOPAC* the court held that the Norris-LaGuardia Act must give way to the Commission's power in the ICA to resolve labor disputes arising out of consolidation and trackage rights proceedings. In *BN* the Eighth Circuit held that the ICA overrides the RLA:

> Under the ICA, Congress sought to provide the ICC with the means to prevent labor strife by assuring "fair wages and working conditions in the railroad industry." 49 U.S.C. 10101a(12). To accomplish this important but limited aim, Congress provided the ICC superseding authority to supervise and implement labor protective conditions in terms of acquisitions, sales, and abandonments of railroad lines . . . In these narrow circumstances, the ICA supersedes the authority of the mandatory bargaining provisions of the RLA which provide an essentially duplicative or overlapping process designed to reach labor protective agreements. Were it otherwise, the ICC's authority in this area, and specifically its recent deregulatory actions, would be largely nullified. 848 F.2d at 862.

Respondent RLEA attempts to refute this case law with the contention that *MOPAC* and *C&NW* involved another section of the ICA (49 U.S.C. 11341(a)) and cannot be used to uphold the Commission's authority in cases concerning 10901. (*BN* however did involve the sale of a rail line under 10901). The presence of Section 11341(a) is not relevant to the issue. While *MOPAC* and *C&NW* arose in the context of a consolidation approved under Section 11343, thus bringing Section 11341(a) into play, there is nothing in either decision to suggest that the decisions were dependent upon that fact.[12] This is borne out by the Eighth Circuit's statement in *MOPAC* signalling its concern that the ICA's scheme for carrying out rail transac-

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[12] 49 U.S.C. 11341(a) provides that the authority of the ICC under Subchapter III of Title 49 is exclusive and that a carrier or person or corporation participating in an approved or exempted transaction is exempt from the anti-trust laws and from all other law as necessary to let that person carry out the transaction.

tions would be undermined by labor's reliance on RLA rights:

> It is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired. 782 F.2d at 112.

The court was not relying on the exemptive language of a single section of the ICA but upholding a coherent statutory scheme. This view of the relationship between the ICA and RLA has passed muster in other decisions. ***B&M,*** ***supra***; ***Burlington Northern Ry. Co.*** v. ***ARSA***, 503 F.2d 58 (7th Cir. 1974); ***cert. denied,*** 421 U.S. 975 (1975); as well as the ***Nemitz, supra***, and ***BN,*** decisions noted above.

Further support for the preemptive effect of the statutory scheme administered by the Commission in the absence of express authority such as Section 11341(a) is found in the line of cases concerning the authority of the Civil Aeronautics Board. In *Kent* v. *CAB,* 204 F.2d 263 (2d Cir.), *cert. denied,* 346 U.S. 826 (1953), the Second Circuit held that the CAB had the power, when approving airline mergers, to adjust seniority rights affected by those mergers without following RLA bargaining procedures. The court held this despite the lack of any specific statutory authority in the Civil Aeronautics Act comparable to Section 11341(a) of the ICA. See also, *American Airlines, Inc.* v. *CAB,* 445 F.2d 891, 895 (2d Cir. 1971), *cert. denied,* 404 U.S. 1015 (1972) where the Second Circuit, citing *Kent*, stated "Congress has vested the Board with the power to approve air line mergers only upon

> such terms as it determines to be just and reasonable . . . The broad scope of a similar provision in the ICA was recognized by the Supreme Court . . . *United States* v. *Lowden.*" . . ."

See also, *Machinists* v. *Northeast Airlines,* 473 F.2d 549, 559-60 (1st Cir. 1972) (RLA procedures are not available

for disputes arising out of air carrier transactions approved by the CAB).[13] The import of these cases is simply that the lack of express statutory exemption does not bar the Commission from approving railroad transactions which may require the preemption of other laws to resolve the labor disputes that would otherwise impede or frustrate the sales transaction.

The Third Circuit also declined to uphold the supersession by the ICA on the ground that the order of the Commission approving the sale was "permissive" rather than "mandatory". Pet. App. 37a-38a. We first point out the fact that the majority of Commission order are "permissive"; including orders involving transactions subject

[13] The courts have also rejected as collateral attacks other actions filed to advance asserted RLA rights where in plaintiffs' view the agency cannot enforce the RLA. See *Oling v. ALPA,* 346 F2d 270 (7th Cir. 1965); *Kesinger v. Universal Airlines,* 474 F2d 1127, 1131-32 (6th Cir. 1973) and *Cary v. O'Donnell,* 506 F2d 107, 110 (D.C. Cir. 1974). The Third Circuit attempted to distinguish this line of cases by pointing out claimed distinguishable factors in one such case *International Association of Machinists v. Northeast Airlines,* 473 F2d 549 (1st Cir.), *cert. denied,* 409 U.S. 845 (1972). After the CAB had approved a merger between the Northeast and Delta Airlines one of the former carrier's unions sued to stop the sale pending bargaining over the effects of the sale under the RLA. The district court denied the injunction and the First Circuit affirmed holding that the airline had no duty to bargain over a merger already subject to CAB approval. Pet. App. 54a.

The Third Circuit points to three factors to support a claim of that case's inappropriateness to this case. Pet. App. 55a. The chief ground of distinction relied on by the *P&LE II* court was that while the *Northeast* court granted labor protections none were granted here. The RLEA here has *never* requested the imposition of labor protections. Further, the Third Circuit's distinction raises the issue of the Commission's authority to grant labor conditions as opposed to its mandate to do so. The Third Circuit's view obviously limits the Commission's authority over rail transactions to situations in which it must grant labor protections. We submit this is a distinction without support in law or logic.

to Section 11341(a) as to which this Court has recognized the Commission's exclusive authority, *ICC* v. *BLE, supra.* In addition, the Third Circuit's distinction was rejected by this Court in *Venner, supra,* where it held that the fact "the order is not mandatory but permissive makes no difference in this regard." 271 U.S. at 131.[14] The permissive-mandatory distinction was also rejected by the Second Circuit in *Railway Labor Executives' Association* v. *Staten Island Railroad,* 792 F.2d 7, 12 (2d Cir. 1986), *cert. denied,* 107 S.Ct. 927 (1987) (*"Staten Island"*).

The Third Circuit attempts to distinguish *Staten Island* on the ground that the order in that case required the seller to consummate the transaction. (Pet. App. 38a, n.27). The distinction is contrary to the rationale of *Venner.* Moreover, the Second Circuit's decision also involved a permissive sale of trackage rights approved by the Commission under 49 U.S.C. 10901. See 792 F.2d at 10, n.5.[15]

The Third Circuit also denied the ICA's supersessive effect because of the "permissive" nature of the labor condi-

[14] The Third Circuit distinguished *Venner* on the ground that the injunction sought in that case "truly would have blocked the approved transaction as violative of state law, as opposed to merely delaying the transaction pending the "exhaustion of bargaining" and because that case, "at bottom, was a federal preemption case. . ." Pet. App. 38a-39a, n.27. Regardless of the court below's characterization of the case, the Commission authorized consummation of the P&LE sale without delay and certainly without awaiting the exhaustion of bargaining which might never result in a resolution of the issues in dispute. Furthermore, the seller was bound by the contract to consummate the sale once the necessary ICC approval was received.

[15] Other courts of appeals have given the same meaning to *Venner* as the Second Circuit and rejected RLEA attempts to have RLA rights engrafted on to a Commission approved transaction as collateral attacks on Commission orders. *United Transportation Union v. Norfolk & Western R. Co.,* 822 F.2d 1114, 1120-1121 (D.C. Cir. 1987), *cert. denied,* 56 U.S.L.W. 3460 (1988); *Brotherhood of Locomotive Engineers v. Boston & Maine Corp.* 788 F.2d 794, 799-802 (1st Cir. 1986), *cert. denied,* 107 S.Ct. 111 (1986).

ditions available under 10901. (Pet. App. (No. 87-1589) 13a, n.8). In this view, the mandate of the Commission to impose labor protective conditions, as opposed to its discretion to do so, becomes the touchstone of ICA's supersessive power. This second "mandatory-permissive" distinction is also illogical. The presence or absence of mandatory labor protections can have no bearing on the authority of the Commission to resolve labor disputes arising out of the authorization of a transaction. The creation of this distinction reduces Commission jurisdiction to an outcome-determinative test. If the Commission imposes labor protections it has exclusive and plenary jurisdiction, if it does not impose such protections jurisdiction over the transaction passes to the RLA. This construction of the statute invites rail labor to challenge the Commission's jurisdiction in cases where, in rail labor's view, the labor protections afforded are deemed insufficient.

D. THE INTERSTATE COMMERCE ACT IS A LABOR STATUTE TO WHICH OTHER LABOR STATUTES MUST BE ACCOMMODATED

At bottom, what drives the challenged decisions of the Third Circuit is the determination that the ICA is not a labor statute. Pet. App. (No. 87-1598) 7a-8a; Pet. App. (No. 87-1888) 44a-52a. The court's denial of the ICA's status as a labor law deprives it of the force that supports accommodation of the RLA and NLGA. Pet. App. (No. 87-1888) 44a. In arriving at this unprecedented holding the Third Circuit relied on two factors.[16] First, it held that,

[16] It is the Commission's view that the cases relied on by RLEA as supporting the decision of the *P&LE* majority may be read as authority only for the proposition that the regulatory process may not be used solely to accomplish objectives that management was unable to obtain through collective bargaining.

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The prevention of resort to use of the Commission's authority to override the RLA to bypass an ongoing negotiation process appears to be the basis for the recent Seventh Circuit decision in *Burlington Northern Railroad Company v. United Transportation Union,* No. 88-2180 (7th Cir., November 18, 1988). Burlington Northern designed and implemented a rail service using fewer crew members than the normal complement (slip op. 2). Local committees of UTU comprising the carrier's Northern Line, however, refused to agree to the new service (slip op. 3). Burlington Northern granted its wholly-owned subsidiary, Winona Bridge, a bridge with five employees, trackage rights over the Northern Line giving Winona Bridge significant rights to the use of the track, with crews of its choosing and not subject to the existing collective bargaining agreements (slip op. 3-4).

Winona Bridge sought and obtained ICC authorization pursuant to 49 U.S.C. 10505 and 49 U.S.C. 11343 to implement the agreement. UTU challenged the agreement and Burlington Northern filed a district court action seeking relief against a threatened strike by the unions (slip op. at 4-5).

On review the Seventh Circuit found the trackage rights agreement to be "an attempt . . . to evade unilaterally the . . . rights vested in the Unions through the use of a trackage rights agreement . . ." (slip op. at 11). This attempt, implemented "only after preliminary negotiations proved unsuccessful" left ". . . little doubt" that Burlington Northern "was intentionally avoiding its obligations to the unions . . ." (slip op. at 14) by "transferring rights to an extension of itself" (slip op. at 17) *citing, Butte, Anaconda & Pacific Ry v. Brotherhood of Locomotive Firemen and Engineers,* 268 F.2d 54 (9th Cir.), *cert. denied,* 361 U.S. 864 (1959).

The same exception to the Commission's exclusive authority can be seen in the recent decision *RLEA v. City of Galveston, Texas,* 849 F.2d 135 (5th Cir. 1988) *pet. for cert. pending,* No. 88-517 (September, 1988). There, Galveston Wharves suffered severe economic losses over 1985 and 1986. Its management opened discussion with its railway labor unions in an effort to obtain wage and work-rule concessions. After these discussions ended without agreement, Galveston Wharves proposed to sell all of its railroad assets and to lease its terminal railroad facilities to a new firm, Galveston Railway, Inc. (GRI). Galveston Wharves announced its intention to

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if Congress had intended that the RLA dispute resolution procedures not apply to ICC approved transactions, Congress would have amended the RLA to so provide. Pet. App. 39a. Second, the Third Circuit majority took a cursory look at the policies in the national transportation policy "upon which the ICC must focus." Pet. App. 46a. It found "only one directs the ICC's attention to the interests of labor, viz. Section 10101a(12)." Pet. App. 46a-47a. On this basis it declared: "Nothing in the statutory language (of the ICA) suggests that this incidental reference to 'fair wages' (in Section 10101a(12)) converts the regulatory scheme over rail transport into a labor law." *Id.* at 48a.[17]

These two critical findings ignore the facts. First, the court failed to recognize that RLA dispute resolution procedures have *not* been applicable to ICC approved rail

do so unless the unions agreed to a 26.4 percent reduction in wages and benefits. With the unions refusal to do so, Galveston Wharves sought and received Commission approval for the transaction. 849 F.2d 146-147. The Fifth Circuit ultimately held that under the circumstances of that case Commission approval did not displace the RLA. *Id.* at 152. This refusal to allow the abuse of the regulatory process is also clearly seen in this Court's opinion in *County of Marin v. United States,* 356 U.S. 412 (1957) and in the decision of the Fifth Circuit in *Texas & New Orleans R.R. Co.* v. *Brotherhood of R.R. Trainmen,* 307 F.2d 151 (5th Cir. 1962) cert. denied, 372 U.S. 952 (1963). We submit that the concerns that motivated the prior decisions—an attempt to abrogate existing collective bargaining agreements where negotiations to modify such agreements under RLA processes had failed—are not present here.

[17] The Eighth Circuit looked at the same Section 10101a(12) policy and concluded that the ICA does supersede the RLA. *BN v. UTU, supra,* 848 F.2d at 862. See also, Judge Hutchinson's dissent, Pet. App. 63a. "Prohibiting the sale and maintaining the status quo until RLA bargaining procedures are exhausted largely ignores all but one of the fifteen factors, viz: labor interests."

transactions for fifty years.[18] Second, the Congress, when considering the issues of labor protections for employees, dealt with them by amending the ICA and not the RLA. The amendments to the ICA over the years belie the court's assertion that it is not a labor statute and in fact proves that the ICA is indeed a labor statute.

Indeed, the history of rail labor is in large measure a history of the Commission and its authority over rail labor management issues arising out of approved rail transactions. The Transportation Act of 1920 (41 Stat. 456) amended the ICA to include provisions giving the ICC jurisdiction over abandonments, line sales to non-carriers and other single carrier transactions (Sections 1 (18) and (20), 41 Stat. 477-478)), and over mergers and other multi-carrier transactions (Section 5(2), 41 Stat. 481). In *Lowden, supra*, 308 U.S. at 238 (1939), this Court confirmed the discretionary authority of the Commission to condition its approval of mergers and other multicarrier transactions pursuant to Section 5 (2) of the amended ICA upon protection of employees when the Commission found doing so to be in the public interest – authority that may "promote the public interest . . . by facilitating the national policy of railroad consolidation . . . by prevent(ing) interruption of interstate commerce through labor disputes growing out of labor grievances".

In 1936 the Washington Job Protection Agreement was adopted. In that document, the major railroads and union agreed that, in railroad "coordinations", there would be binding arbitration of labor issues permitting consumma-

[18] The *P&LE II* court held (Pet. App. 6a) that Congress "has not chosen to relieve management of any of the onerous burdens imposed by the RLA." As we will demonstrate, since the adoption of Washington Job Protection Agreement in 1936, there have been *no* burdens imposed by RLA on Commission authorized transactions.

tion of the transaction. Speedy, mandatory arbitration (outside of RLA) allowing railroads to change the status quo by completing the merger, sale or transfer, and to achieve the benefits of the agreed upon transaction, has been the norm since that time. See, *New York Dock Ry. Co.* v. *United States*, 609 F.2d 832, 86-90 (2d Cir. 1979), approving standard Commission imposed labor protective conditions in carrier consolidations which subsumed the WJPA process. F.D. No. 30532, *Maine Central R.R., Georgia Pacific Co., Canadian Pacific Ltd. and Springfield Terminal Railway Co. – Exemption from 49 U.S.C. 11342 and 11343, aff'd sub. nom. RLEA* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987). These conditions permit consummation of the transaction after an agreement is reached through prompt, binding arbitration. See, also, *RLEA* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) approving Commission imposition of labor conditions on carriers granting trackage rights and leases to another carrier. These conditions permit consummation prior to reaching agreement through binding arbitration. With minor variations, these conditions (which avoid the RLA's notice, status quo and dispute resolution provisions) have been applied in virtually all railroad combinations, sales and other transactions, including abandonment of rail lines, since that time.

The Transportation Act of 1940, *supra*, amended Section 5 of the ICA to mandate employee protections as a condition of the Commission's approval of merger and other multicarrier transactions.[19] Indeed, those mandatory protections constituted a minimum and the Commission retained discretion to impose additional labor protections. *Railway Labor Association* v. *United States*, 339 U.S. 142 (1950).

[19] The *Lowden* court noted the pendency of the legislation that became the 1940 Transportation Act and concluded that the Act did not negate the conclusion that the ICC had implied power over labor protection but that Congress merely sought to make mandatory what had been discretionary. *Lowden, supra*, at 239.

The 4R Act, *supra*, included provisions, enacted as Section 1a of the ICA, which separated abandonments from other single carrier transactions which had been governed by Section 1 (18) and mandated employee protections for certain approved abandonments. However, the Commission retained "discretion" to fit employee protections "to the facts and circumstances attending a particular abandonment." *Simmons* v. *ICC*, 697 F.2d 326, 336 (D.C. Cir. 1982).[20] The Staggers Rail Act, *supra*, made labor protections mandatory in connection with the abolition of railroad rate bureaus (Section 219(g)) and the sale of a line under the feeder line program (49 U.S.C. 10910(j)); prohibited exemptions from provisions of the ICA without required labor protection (49 U.S.C. 10505(g)(2)); and prohibited the Commission from imposing protections on sales of lines under Section 10905 as well as giving the Commission discretion to impose protective conditions on the construction of new rail lines and sales of existing lines to new operators.[21]

This extensive history of the ICC rail labor dispute resolution authority was ignored by the Third Circuit. This history demonstrates conclusively that the ICA is a labor statute and has maintained that status for fifty years. Moreover, this history also refutes the *P&LE II*

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[20] The ICA was codified and reenacted in 1978 as Subtitle IV of 49 U.S. Code, 92 Stat. 1337. The authority of the ICC over line sales and other single carrier transactions apart from abandonments was codified as Section 10901; its authority over abandonments was codified as Section 10903; and its authority over mergers and other multicarrier transactions was codified as Sections 11341-11347; the recodification was without substantive change.

[21] It should also be noted that in passing the Staggers Act Congress voted down an attempt, contained in the House version of the bill, to make labor protections mandatory in the sale of rail lines under section 10901. See, H.R. Rep. 1430, 96th Cong. 2d Sess. 115-116 (1980).

court's contention that the agency has no labor expertise and that Congress could not have intended it to be the arbiter of rail labor disputes. Pet. App. 51a.

The only logical reading of the ICA confirms that it is a labor statute when dealing with disputes arising out of rail transactions committed to the Commission by Congress. It is the *only* rail labor statute Congress contemplated for resolving labor disputes which arise out of ICC approved or exempted rail transactions. The Congress has been aware of the Commission's role in this area. In amending the ICA Congress has at times required greater and at times lesser protection for various Commission transactions.[22] But in either event the Congress has certainly intended the Commission to be the sole arbiter of rail labor disputes arising out of Commission authorized transactions.[23]

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[22] In fact, the ICA has more indicia consonant with a labor statute than the RLA. The RLA provides only procedural protections. The ICA provides procedural protections and either mandatory or discretionary substantive protections such as wage guarantees, severance pay, and moving expenses, etc. See, *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, 76, 84 (1979), *aff'd sub. nom. New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979).

[23] The *P&LE II* decision holds that the Congress intended the RLA and ICA to "co-exist", Pet. App. 50a *citing P&LE I, supra* at 1236. *P&LE I* in turn cites the case of *Order of R.R. Telegraphers v. Chicago & Northwest Ry. Co.*, 362 U.S. 330 (1960) ("*ORT*") as rejecting "arguments comparable to those made by P&LE" in support of the ICA's supersession of the RLA and NLGA. *P&LE I, supra* at 1236. In *ORT*, the Court refused to enjoin a strike growing out of a labor dispute that arose out of a railroad's decision to close several stations. To the *P&LE* Court this case limits the ICA's supersession of the RLA and NLGA. However, *ORT* did not concern the Commission's authority over a rail transaction. Indeed, the Commission's authority was in no way implicated in that case. Moreover, *ORT* and

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E. THE PROCEDURES ESTABLISHED IN EX PARTE 392 ARE DESIGNED TO RESOLVE RAIL LABOR DISPUTES PEACEFULLY AND ARE AS ENTITLED TO PROTECTION AS ARE THE COMPARABLE PROCEDURES OF THE RLA

The Congress enacted the NLGA, *supra,* "to remedy the growing tendency of federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade . . ." *Jacksonville Bulk Terminals* v. *Longshoremen,* 457 U.S. 702, 708 (1982). While the Court has given a broad interpretation to the anti-injunction provision of the Act, the Court has also held them to be inapplicable "where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." (*Id.*).

This accommodation doctrine reflects the rule that consideration must be given to the "total corpus of pertinent law and the policies that inspire ostensibly inconsistent provisions." *Boys Markets* v. *Clerks' Union,* 398 U.S. 235, 250 (1970). By this process the court can interpret statutes in ways that "make sense". *Fausto, supra.* Two leading cases in this area are *Chicago River, supra,* and *Boys Market, supra.* In *Chicago River,* this Court held that federal courts could enjoin a strike to protect the jurisdiction of the National Railroad Adjustment Board so the Board could resolve the rail labor dispute through the arbitration procedure established under RLA. In *Boys*

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another case relied on by the *P&LE* majority, *Texas & New Orleans R.R. Co. v. Brotherhood of R.R. Trainmen, supra.* were decided well before the passage of the significant rail legislation designed to halt the decline of the rail industry, and many of this Court's decisions confirming the exclusive and plenary jurisdiction of the Commission over rail transactions. Thus, *ORT* has no vitality in the case before the Court.

Market, the Court held that NLGA did not deprive the courts of jurisdiction to enjoin a strike where the dispute was subject to a Labor Management Relations Act, 29 U.S.C. 141, *et seq.* arbitration procedure. The procedures established by *Ex Parte 392* in Section 10901 transactions are akin to those protected by the Court in *Chicago River* and *Boys Market* and require protection so that they may be allowed to work notwithstanding the NLGA.

Like the procedures in the above named cases, the procedures here channel rail labor disputes arising out of the Section 10901 sales transaction into a peaceful resolution of the issue. The method established for this resolution is the petition for revocation of the exemption. Section 10505(d) of the ICA makes this remedy available to any party with a claim that the exemption was improperly granted or is in any way deficient. 49 CFR 1150. Through this device any party can attempt to demonstrate to the Commission that labor protective conditions are warranted in the public interest. The Commission is required to act on the petition and by way of remedy may terminate the exemption, cancel its approval or impose labor conditions. This Commission determination is of course reviewable in the courts of appeals. 28 U.S.C. 2341. What the Commission has available in the *Ex Parte 392* procedures is a comprehensive administrative scheme to resolve any dispute arising out of the transaction that is equivalent to the processes protected by the Court in *Boys Market* and *Chicago River.*[24]

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[24] While the ICA is certainly a labor law for the purposes of rail transactions approved under 10901 it may be suggested that the accommodation doctrine only applies to statutes that qualify "formally" as labor laws. However, neither *Chicago River* or *Boys Market* mandates such a requirement. Further, non labor law statutes have been considered to have administrative procedures which require protection

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F. THE THIRD CIRCUIT'S DECISIONS DESTROY THE COMMISSION'S ABILITY TO FOSTER RAIL TRANSPORTATION SERVICE IN THE PUBLIC INTEREST

The Third Circuit decision contends that the RLA and ICA must be read together in order to save RLA from an implied repeal. Pet. App. 6a. As we have demonstrated this case is not about the repeal of the RLA (Argument, Section B, supra). The RLA has no applicability to rail transactions committed by Congress to the Commission. Moreover, to read the RLA into the process of rail transactions reads the ICA out of the process. Any determination by the Commission that labor protections are not appropriate to a rail transaction becomes purely advisory if the transaction is subject to the RLA. Any rail transaction is henceforth subject to a rail labor veto with the invocation of the RLA. The Commission's determination about the public interest with respect to the transaction which is required to take into account among other things the interests of rail employees becomes a nullity.

Two conflicting regimes are here presented to make one determination—Whether and what labor protections are appropriate in rail line sales transactions. In the regime proposed by the Commission, the interests of all relevant participants including rail employees will be balanced in determining whether to authorize the transaction as in the public interest and what conditions, if any, to impose for the protection of employees. In the regime imposed by the Third Circuit, rail labor will decide whether, or on what

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from the courts. See, *Boston and Maine Corp. v. Lenfest,* 799 F.2d 795, 800-804 (1st Cir. 1986) *cert. denied,* 107 S.Ct. 1333 (1987). (Where Congress has channeled labor disputes arising out of the Federal Railroad Safety Act (FRSA) 45 U.S.C. 441 *et seq.* into an arbitration procedure the court could enjoin the union from striking once the procedure became available).

terms, the transaction should be consummated despite the public interest determination of the Commission. The Commission's public interest finding will always be subordinate to any dissatisfaction by rail labor with the protections afforded because of the unfettered ability to strike created by the decision of the court below. This was not the intent of Congress when it established the Commission as the agency with the authority and power to maintain the nation's rail transportation system. The decisions of the court below destroy the Commission's ability to implement an important congressional program and must be overturned. *Udall* v. *Tallman, supra.*

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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